THE STATUS OF CUSTOMARY INTERNATIONAL LAW IN U.S. COURTS—BEFORE AND AFTER ERIE
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I. INTRODUCTION

The greatest weakness of international human rights law may be the lack of an effective enforcement mechanism. There is, to date, no general international criminal court. The jurisdiction of existing international tribunals, such as the International Court of Justice, often requires state consent, and the formal sanctions for noncompliance with the tribunals' decisions are often weak or nonexistent. Needless to say, the domestic courts of the alleged violator of human rights cannot always be counted on to provide an effective forum for enforcement. Although there are less formal methods of enforcement, such as monitoring by international organizations and self-reporting, these methods are not generally regarded as sufficient to deter widespread human rights abuses. As Professor Mark Janis has observed, "The central problem has become not so much finding a universal law of human rights (most agree that one now exists), but enforcing that law."¹

This enforcement problem may explain why human rights advocates have been so intent on having U.S. courts pass judgment on alleged human rights abuses occurring in other countries. Given encouragement by the seminal Filartiga decision,² there have been numerous

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² Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). In Filartiga, the court allowed two Paraguayans to sue a former Paraguayan military official for allegedly violat-
cases brought in recent years concerning alleged human rights abuses committed in places such as Bosnia, Ethiopia, Guatemala, and the Philippines. These cases typically involve torture, summary execution, war crimes, or other egregious conduct by foreign government or quasi-government actors. Although it may be difficult for the plaintiffs in these cases to collect damage awards, many of them find value in simply obtaining a formal condemnation of the conduct in question.

Lawyers and commentators are now turning their attention inward to some extent, seeking to apply the international human rights standards to U.S. government actors. Again, they are looking to U.S. courts. And, for a variety of reasons, the international law they seek to have the courts apply is customary rather than codified. This customary law, they argue, has the status in this country of federal common law.

In a recent article, Professor Jack Goldsmith and I provided a crit-

8. See articles cited infra notes 14-17; see also Paul L. Hoffman, The "Blank Stare Phenomenon": Proving Customary International Law in U.S. Courts, 25 GA. J. INT'L & COMP. L. 181, 189 (1995/96) (noting that "the critical crossroads for the [Filartiga] precedents will come when we try to rely upon them to sue U.S. government defendants"); Jules Lobel, The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law, 71 VA. L. REV. 1071, 1073-74 (1985) ("Subjecting violations of international law by foreign governments to federal court review makes it difficult to justify shielding similar violations by our own government from judicial scrutiny.").
9. There are two principal types of international law—treaties and customary international law. A treaty is a "purposeful agreement among states." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. I, ch. 1, introductory note at 18 (1987) [hereinafter RESTATEMENT (THIRD)]. Customary international law is the law of the international community that "results from a general and consistent practice of states followed by them from a sense of legal obligation." Id. § 102(2); see also Statute of the International Court of Justice, art. 38(1)(b), 59 STAT. 1055, T.S. No. 993 (sources of international law include "international custom, as evidence of a general practice accepted as law"). Although much of international human rights law is reflected in treaties as well as in customary international law, the treaties generally cannot be invoked as a source of law in U.S. courts, either because the United States has declined to ratify the treaties or because it has declared them to be "non-self-executing." See text accompanying notes 100-110.
tique of the proposition that customary international law has the status of federal common law, a proposition that we called the "modern position." The modern position has become widely accepted only in the last twenty years, and to date it has been invoked primarily in international human rights litigation. Among other things, it has been invoked to support the constitutionality of the Alien Tort Statute, which purports to give the federal district courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Many suits brought under the Alien Tort Statute are between aliens and concern alleged violations of customary international law. Because Article III diversity jurisdiction does not extend to suits between aliens, it may be that federal courts can constitutionally hear such cases only if customary international law has the status of federal law.

The potential consequences of the modern position, however, are far greater than merely opening the doors of the federal courts to alien-alien suits under the Alien Tort Statute. If customary international law has the status of federal common law, it presumably preempts inconsistent state law in this country. Thus, to recite a few examples, it might be used to invalidate state laws ranging from death penalty provisions, to state immigration measures like California's Proposition 187, to limitations on the rights of homosexuals. Perhaps even more dramatically, some proponents of the modern position argue that, because customary international law is federal law, the President may be compelled

by the courts to follow it. Some proponents even argue that customary international law supersedes inconsistent federal legislation, at least if the customary international law is formed after the enactment of the legislation. Professor Jordan Paust, a fellow panelist at this Colloquium, goes so far as to argue that some customary international law norms have the status of U.S. constitutional law and therefore supersede even later-in-time federal legislation.

For purposes of this panel discussion on the impact of international law in the domestic arena, I will elaborate on two points made by Professor Goldsmith and myself in our recent article: first, that customary international law did not have the status of federal law in the nineteenth century; and, second, that customary international law's purported status today as federal common law is at least in tension with the Supreme Court's decision in *Erie Railroad v. Tompkins.* In doing so, I will discuss several examples that tend to clarify and confirm these claims. In addition, because Professor Paust is a participant on this panel, I will highlight some areas of disagreement between Professor Paust and myself. I will not attempt here, however, a point-by-point rebuttal of Professor Paust's "some nineteen points of disagreement and concern" with Professor Goldsmith's and my views (recited by Professor Paust without much explanation in a long footnote), although much of what I say here will be relevant to those points.

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18. See JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 5-6, 95, 174-75, 186, 193-95, 324-25, 338-45, 371 (1996). Notwithstanding Professor Paust's arguments, the lower courts uniformly have rejected the proposition that customary international law supersedes federal legislation. See, e.g., Galo-Garcia v. I.N.S., 86 F.3d 916, 918 (9th Cir. 1996); United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991); Garcia-Mir v. Meese, 788 F.2d 1446, 1453-54 (11th Cir. 1986).

19. 304 U.S. 64 (1938).


21. Nor do I discuss here the use of international law by courts in interpreting federal enactments. This interpretative use of international law is reflected, for example, in the "Charming Betsy canon," pursuant to which courts will, "[w]here fairly possible," construe federal statutes "so as not to conflict with international law." RESTATEMENT (THIRD), supra note 9, § 114; see also Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("An act of congress ought never to be construed to violate the law of nations if any other possible construction remains . . ."). For discussion of the history and proper role of the Charming Betsy canon, see Curtis A. Bradley, The Charming Betsy Canon and
II. STATUS OF CUSTOMARY INTERNATIONAL LAW IN THE NINETEENTH CENTURY

A number of courts and commentators have relied on history to support their claim that customary international law today has the status of federal common law. The court in Filartiga, for example, claimed that customary international law “has always been part of the federal common law.” 22 Other courts have invoked history in claiming that it is “well settled” that customary international law has the status of federal common law. 23 Several commentators similarly have claimed that customary international law had the status in the nineteenth century of federal law. 24 In making these claims, courts and commentators typically cite to statements in early Supreme Court decisions referring to the law of nations as, for example, “part of the law of the land” 25 or “part of our law.” 26

These courts and commentators are impliedly arguing that, because customary international law had a certain status in the nineteenth century, it should have that status today. The proper weight to be attributed to history in legal analysis is, of course, a matter of substantial controversy. 27 Moreover, “[h]istory itself cannot justify guidance by history”; rather, the justification “must . . . come from theory.” 28 My focus here is not on that theoretical question, however, but rather on the premise that customary international law had the status in the


22. Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980).
24. See, e.g., PAUST, supra note 18, at 5-8; Glennon, supra note 16, at 345-47; Lobel, supra note 8, at 1090-95.
27. This controversy is reflected, for example, in the debates between “originalist” and “textualist” theories of constitutional interpretation. See Lawrence Lessig, Translating Federalism: United States v. Lopez, 1995 SUP. CT. REV. 125, 127-28 (discussing these debates). In the context of international law, compare PAUST, supra note 18, at 6, 34 (relying on early U.S. history to support claims regarding current domestic legal status of customary international law), with Stewart Jay, The Status of the Law of Nations in Early American Law, 42 VAND. L. REV. 819, 849 (1989) (stating that “their contextual differences from world affairs should lead us to view the various statements about the law of nations from that era as having no bearing on modern controversies”).
nineteenth century of federal law. The historical evidence suggests that courts and commentators have been taking statements by the Supreme Court out of context and that customary international law was not in fact treated in the nineteenth century as federal law.29

In the nineteenth century, federal courts applied a body of law that has come to be referred to as “general law” or “general common law.”30 General common law was not viewed as emanating from any one sovereign source, but rather from “common practice and consent among a number of sovereigns.”31 In Justice Holmes’ words, general common law was “a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.”32 Thus, “American courts resorted to this... body of preexisting law... without insisting that the law be attached to any particular sovereign.”33

The important point for present purposes is that general common law was not viewed as federal law. In particular, it was not considered part of the “Laws of the United States” within the meaning of Articles III and VI of the Constitution. Thus, federal court interpretations of general common law were not binding on the states, and a case arising under general common law did not establish federal question jurisdiction.34

Prior to Erie, customary international law (referred to in the nineteenth century as part of the “law of nations”)35 had the status of general common law.36 Indeed, the Supreme Court’s most famous applica-

29. The following discussion elaborates on Bradley & Goldsmith, supra note 10, at 822-26.
31. Id. at 1517.
33. Fletcher, supra note 30, at 1517.
36. My claim is not that the law of nations was always labeled as general common law, just that it was treated like other bodies of law that have come to be referred to as general common law—in particular, that it was treated as non-federal law. Consequently, my claim is not undermined by the existence of decisions, such as those cited by Professor Paust, in which courts referred separately to the “common law” and the “law of nations.” See PAUST, supra note 18, at 30-32. It is worth noting, however, that the Supreme Court on several occasions in the nineteenth and early twentieth centuries did refer to the law of nations as part of the “general law,” which was the phrase the Court used for general
tion of general common law, *Swift v. Tyson*, involved the law merchant, which was then a component of the law of nations. Customary international law, like other general common law, was viewed as emanating not from a particular sovereign source, but rather from principles of natural law and from international custom. When courts applied this law, they were not seen as "legislating," because, among other things, the law was believed to be objective and discoverable.

Importantly, customary international law, like other general common law, was not considered part of the "supreme Law of the Land" in Article VI. Nor was it considered part of the "Laws of the United States" for purposes of constitutional or statutory federal question jurisdiction. These historical conclusions, although resisted by some commentators, are supported by several examples.

First, the Supreme Court in the nineteenth and early twentieth centuries consistently refused to review lower court rulings concerning customary international law, on the ground that the cases did not arise

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41. See, e.g., Charles Perlg, *Judicial Interpretation of International Law in the United States* 19 (1928) (if state statute "violates an established principle of international law... clearly there would be only one course open to the courts, viz., to enforce the state statute, always assuming its constitutionality and that it does not contravene any valid federal enactment, or any treaty"); Quincy Wright, *The Control of American Foreign Relations* 161 (1922) ("state constitution or legislative provision in violation of customary international law [was] valid unless in conflict with a Federal constitutional provision or an act of Congress").
42. See Bradley & Goldsmith, *supra* note 10, at 824.
43. See, e.g., Paust, *supra* note 18, at n.71.
under federal law. In an 1875 decision, for example, the Court held that it lacked jurisdiction to review issues concerning "the general laws of war, as recognized by the law of nations" because such issues did not involve "the constitution, laws, treaties, or executive proclamations, of the United States" but rather concerned only "principles of general law alone." 44 The Court reached this conclusion over Justice Bradley's lone dissent, in which he specifically argued that a claim under "unwritten international law" is made under the "laws of the United States." 45 Similarly, in an 1886 decision, the Court held that the question whether forcible seizure of a criminal defendant in a foreign country is grounds to resist trial in state court is "a question of common law, or of the law of nations" that the Court has "no right to review." 46 And, in a 1924 decision, the Court held that it did not have jurisdiction to review an issue concerning foreign sovereign immunity—an issue governed by customary international law—because that issue was one of "general law" over which the Court had no jurisdiction. 47

Second, in several decisions in the nineteenth century, the Supreme Court indicated (admittedly in dicta) that customary international law is not to be applied if it is inconsistent with federal legislation or a controlling executive act. In the famous Paquete Habana decision in 1900, for example, the Court stated that U.S. courts are to apply customary international law "where there is no treaty, and no controlling executive or legislative act or judicial decision." 48 In an earlier decision, the Court said that it was bound by the law of nations "[t]ill . . . an act [of Congress] be passed." 49 In still another decision, 50 the Court emphasized that the international law it was applying did not conflict with Presidential action 51 and described the law of nations as "a guide which the sovereign follows or abandons at his will." 52 The lower courts have in-

45. Id. at 288 (Bradley, J., dissenting).
48. The Paquete Habana, 175 U.S. 677, 700 (1900); see also id. at 708 (courts must "give effect to" customary international law "in the absence of any treaty or other public act of the government in relation to the matter").
49. The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815).
51. Id. at 121-23.
52. Id. at 128. For differing views regarding the significance of this decision, compare Jonathan I. Charney, The Power of the Executive Branch of the United States Government to Violate Customary International Law, 80 Am. J. Int’l L. 913, 922 n.27 (1986) (describing Brown as "the clearest case in which the President's wide discretion in this area is acknowledged"), with Jordan J. Paust, The President is Bound by International Law, 81 Am. J. Int’l L. 377, 380 (1987) (stating that "the various opinions of the Justices in Brown
terpreted these decisions to stand for the proposition that Congress and the President have the power to violate customary international law.\textsuperscript{53}

Finally, in a number of instances in the nineteenth and early twentieth centuries, the federal government made statements to foreign governments that the violation of customary international law by a state did not by itself create an issue of federal law. In the early nineteenth century, there were instances of state prosecution of foreign citizens in alleged violation of immunities under the law of nations. In these instances, the federal government disclaimed the power to interfere with or review the state court proceedings absent federal legislation on the subject.\textsuperscript{54} In the late nineteenth and early twentieth centuries, there were instances in which the states failed to prosecute perpetrators of mob violence against aliens, in alleged violation of obligations under customary international law. Again, the federal government maintained that it lacked the authority to compel state compliance with customary international law in the absence of a treaty or federal statute on the subject.\textsuperscript{55}

Because of these and other examples, a number of commentators have concluded, like Professor Goldsmith and myself, that customary international law had the status in the nineteenth century of general common law, not federal law. Thus, for example, Professor Stewart Jay has stated that “[t]he law of nations was classified as ‘general law’ in the sense that \textit{Swift v. Tyson} later employed the term.”\textsuperscript{56} Similarly, the

\textsuperscript{53} See also \textit{PAUST, supra} note 18, at 144-45 (discussing \textit{Brown}).


\textsuperscript{55} See \textit{Bradley & Goldsmith, supra} note 10, at 825; see also \textit{WRIGHT, supra} note 41, at 20-24 (1922) (discussing examples); David J. Bederman, \textit{The Cautionary Tale of Alexander McLeod: Superior Orders and the American Writ of Habeas Corpus}, 41 EMORY L. J. 515 (1992) (same). An early example of this view is an opinion by Attorney General Levi Lincoln, in which he stated that no federal law was violated by an assault on a Spanish ambassador in violation of the law of nations because the law of nations is “part of the municipal law of each state.” Insult to the Spanish Minister, 5 Op. Att’y. Gen. 691, 692 (1802).

\textsuperscript{56} See \textit{Bradley & Goldsmith, supra} note 10, at 825; see also \textit{CHARLES CHENEY HYDE, INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES § 290, at 518 (1922) (noting that the federal government was “obliged to content itself with requesting the Governor of such State to set in motion the local machinery of justice”); Charles H. Watson, Need of Federal Legislation in Respect to Mob Violence in Cases of Lynching of Aliens, Lecture Delivered at the School of Civics and Philanthropy, Chicago, Ill. (Mar. 13, 1916), in 25 YALE L.J. 561, 570 (1916) (“[T]he federal officers and courts have no power in such cases to intervene for either the protection of a foreign citizen or for the punishment of his slayers.”) (quoting \textit{PRESIDENT HARRISON, FOREIGN RELATIONS OF THE UNITED STATES 686 (1891)).
Restatement (Third) of the Foreign Law of the United States, which is otherwise supportive of broad claims regarding the status of customary international law, observes that, "[d]uring the reign of Swift v. Tyson. . . . State and federal courts respectively determined international law for themselves as they did common law, and questions of international law could be determined differently by the courts of various States and by the federal courts." Even Professor Louis Henkin, perhaps the leading proponent of the modern position, appears to have conceded, at least in some writings, that customary international law was not treated as federal law in the nineteenth century. It is telling that the commentators who disagree with this conclusion are unable to cite a single decision from the nineteenth century in which a court invalidated a presidential, congressional, or state enactment on the basis of a conflict with customary international law.

III. THE IMPLICATIONS OF ERIE FOR THE STATUS OF CUSTOMARY INTERNATIONAL LAW

That customary international law did not have the status of federal common law in the nineteenth century does not mean, of course, that it should not have this status today. It is possible that other, non-historical arguments might support the treatment of customary international law today as federal common law. This is not the place for a comprehensive response to such arguments, some of which are addressed in the article by Professor Goldsmith and myself. It is sufficient for present purposes to note that, to be successful, such arguments must overcome a number of constitutional concerns, including the countermajoritarian concern of unelected judges applying law derived from sources largely external to the domestic political process, the separation-of-powers concern associated with judges interpreting and enforcing such law without authorization to do so from the political branches, and the federalism concern of federal judges making supreme federal law in this area binding on the states.

My focus here is not on these constitutional issues per se, but rather on a single event that, by itself, substantially undermines the modern position claim that customary international law has the status

57. Restatement (Third), supra note 9, ch. 2, introductory note, at 41.
58. See Henkin, supra note 17, at 886 n.69; Louis Henkin, International Law as Law in the United States, 82 Mich. L. Rev. 1555, 1557-58 (1984); but see Louis Henkin, INTERNATIONAL LAW: POLITICS AND VALUES 69 (1995) (asserting, without citational support, that customary international law has historically been supreme federal law).
of federal common law. That event is the Supreme Court's decision in \textit{Erie Railroad v. Tompkins}.\textsuperscript{60} The \textit{Erie} decision, while long the subject of substantial attention by federal courts and civil procedure scholars, has generally been ignored by proponents of the view that customary international law has the status of federal common law. This is surprising, given that \textit{Erie} appears to have direct relevance to that view on a number of levels.\textsuperscript{61}

As discussed above, the federal courts in the nineteenth century felt free to develop their own general common law, independent of the common law developed by state courts. In overruling the nearly century old \textit{Swift v. Tyson} decision that had approved this practice, the Court declared that "[t]here is no federal general common law."\textsuperscript{62} As a result, the Court held, consistent with its reading of the Rules of Decision Act,\textsuperscript{63} that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."\textsuperscript{64}

As we have seen, customary international law had the status in the nineteenth century of general common law.\textsuperscript{65} \textit{Erie}'s holding therefore could be read as directly precluding independent application of customary international law by the federal courts. Indeed, no less a judge than Learned Hand reached this very conclusion.\textsuperscript{66}

One obvious response to this argument, made by Professor Philip Jessup shortly after \textit{Erie} was decided, is that, notwithstanding its broad language, the Court in \textit{Erie} was "surely was not thinking of international law."\textsuperscript{67} While this is probably true, it is not by itself a particularly persuasive response. The Court in \textit{Erie} was not thinking specifically about many areas of law that are presumably subject to its holding. More fundamentally, the Court \textit{was} thinking about-and speaking to-the proper role of the federal courts in making law. That

\textsuperscript{60} 304 U.S. 64 (1938).
\textsuperscript{61} The following discussion elaborates on Bradley & Goldsmith, \textit{supra} note 10, at 852-55.
\textsuperscript{62} 304 U.S. at 78.
\textsuperscript{63} The Rules of Decision Act was originally enacted as part of the Judiciary Act of 1789 and today appears at 28 U.S.C. § 1652. The Act provides: "The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."
\textsuperscript{64} 304 U.S. at 78. The Court forgot about treaties, which are also mentioned in the Rules of Decision Act (as well as in the Supremacy Clause).
\textsuperscript{65} \textit{See supra} notes 34-56 and accompanying text.
\textsuperscript{66} \textit{See} Bergman v. De Sieyes, 170 F.2d 360, 361 (2d Cir. 1948). Judge Hand did add the following caveat: "Whether an avowed refusal [by a state] to accept a well-established doctrine of international law, or a plain misapprehension of it, would present a federal question we need not consider, for neither is present here." Id.
aspect of its analysis does not seem to depend on the particular law in question.

In any event, even if the actual holding of *Erie* does not speak to the issue, the reasoning of *Erie* provides additional grounds for questioning the claim that federal courts today have the independent power to apply customary international law. As Justice Frankfurter later explained, *Erie* "did not merely overrule a venerable case. It overruled a particular way of looking at law."68 Specifically, the Court in *Erie* rejected two theoretical underpinnings of nineteenth-century jurisprudence: the idea that federal courts can apply law not derived from a sovereign source, and the idea that courts merely discover the common law rather than make it.

In rejecting the first idea, the Court explained that the practice of the federal courts in developing their own general common law had rested on a "fallacy."69 This fallacy involved the assumption, in the words of Justice Holmes, that "there is 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.'"70 In fact, said the Court (again quoting Holmes), "law in the sense in which courts speak of it today does not exist without some definite authority behind it."71

In rejecting the second idea, the Court expressed the view that courts do not discover common law, they make it. The Court quoted Justice Field's observation, for example, that federal general common law "is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject."72 The Court therefore emphasized the need to identify the source of the authority being exercised by the federal courts, noting, for example, that "no clause in the Constitution purports to confer [general common-lawmaking] power upon the federal courts."73

These two ideas rejected in *Erie* had served to legitimize judicial

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68. Guaranty Trust Co. v. York, 326 U.S. 99, 101 (1945); see also, e.g., *BRIDWELL & WHITTEN*, *supra* note 40, at 130 ("Erie purported to overrule a particular philosophy of, or manner of looking at, law"); *ERWIN Chemerinsky, Federal Jurisdiction* § 5.3.5, at 300 (2d ed. 1994) ("the decision reflected a major shift in jurisprudence away from a belief that courts simply apply preexisting objectively true natural law principles"); Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 283 (1992) ("Erie's real significance is that it represents the Supreme Court's formal declaration that this [nineteenth-century] view of the common law (with all its implications for our understanding of law in general) is dead . . . .").

69. 304 U.S. at 79.

70. *Id.* (quoting Black & White Taxicab v. Brown & Yellow Taxicab, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

71. *Id.*

72. *Id.* at 78 (quoting Baltimore & Ohio R. Co. v. Baugh, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

73. *Id.*
application of customary international law in the nineteenth century. With these ideas repudiated, the claim that federal courts can continue to apply customary international law independent of incorporation by the political branches becomes at least questionable. This is especially so given the fundamental difference between pre-Erie general common law and post-Erie federal common law—the latter is considered supreme federal law binding on the states. As Professor Weisburd has explained, “extending federal common law status to customary international law would federalize a subject over which the Supreme Court consistently disclaimed control even pre-Erie.”

Of course, notwithstanding Erie, the federal courts have continued to create some common law. This post-Erie “federal common law,” unlike the earlier general common law, is considered part of supreme federal law and thus is binding on the states. Although scholars differ significantly regarding the proper scope of federal common law, many agree that, in light of Erie, there must be some sort of authorization from the Constitution or federal legislation for the federal courts to engage in this lawmaking.

So, we are left with the following question: Where is the authorization for the federal courts to apply customary international law as federal common law? The authorization cannot easily be found in the text of the Constitution. Article VI of the Constitution declares treaties to be the supreme law of the land, and Article III extends the federal

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74. See supra note 39 and accompanying text.
76. See Henry J. Friendly, In Praise of Erie—And of the New Federal Common Law, 39 N.Y.U. L. REV. 383, 405-07 (1964). Judge Friendly famously referred to this common law as the “new federal common law.” In fact, the common law before Erie was not, at least generally, federal. See supra note 33 and accompanying text. The confusion arises because “federal” can refer to the nature of the law (supreme federal law) or the source of the law (federal courts).
79. In a recent article, Professor Lawrence Lessig misstates the authorization requirement proposed by Professor Goldsmith and myself as requiring that, “before international law gets incorporated into a domestic regime, a statute must ratify it.” Lawrence Lessig, Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory, 110 harv. L. Rev. 1785, 1810 (1997). In fact, all that our thesis requires is “political branch authorization,” something that, as we explained, could take a variety of forms and may not always be easy to ascertain. See Bradley & Goldsmith, supra note 10, at 819-20, 869, 870, 871.
80. See U.S. Const. art. VI (“all Treaties made, or which shall be made, under the
judicial power to cases arising under treaties, but neither article mentions customary international law. The only reference in the Constitution to customary international law is its delegation of power to Congress to define and punish offenses against the law of nations. As for statutory authorization, Congress has not enacted any statute purporting to authorize general incorporation of customary international law into federal law. It has instead incorporated customary international law into federal law in select instances, something that would be largely superfluous if all of customary international law were federal common law.

Professor Paust maintains that the authorization comes from the reference in Articles III and VI of the Constitution to the "Laws of the United States," which he maintains encompasses customary international law. There are a number of difficulties with this argument. First, it does not sit well with the historical evidence, which, as discussed above, suggests that customary international law was treated like general common law, not federal law. Indeed, Professor Paust's argument appears to be the same one made in 1875 by Justice Bradley

Authority of the United States, shall be the supreme Law of the Land; . . . .”).

31. See U.S. CONST. art. III, § 2 ("The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . .").


35. See Paust, supra note 18 at 6; see also Comment, Federal Common Law and Article III: A Jurisdictional Approach to Erie, 74 YALE L.J. 325, 328 (1964) (making similar argument).

36. See supra notes 34-56 and accompanying text; see also Jay, supra note 34, at 832-33 (explaining that the law of nations probably was not mentioned in Articles III and VI of the Constitution because it was considered general law, not federal law); Weisburd, supra note 16, at 1233 (explaining that, "at least throughout the eighteenth and nineteenth centuries, customary international law was not seen as part of the law of the United States, as that term is used in article III of the Constitution.")
and rejected by all the other members of the Supreme Court. Moreover, the argument ignores other language in the Constitution, such as the requirement in Article VI that "Laws of the United States" be "made in pursuance" of the Constitution. In light of that requirement, Article VI cannot easily be read to include customary international law, given that, as Professor Henkin notes, customary international law "is not made by the United States and through its governmental institutions alone but by them together with many foreign governments in a process to which the United States contributes only in an uncertain way and to an indeterminate degree." In addition, reading it that way would contradict "the [Framers'] prepositivist understanding that judges merely discovered law." Finally, the argument does not explain why the Framers would mention the law of nations specifically in Article I but refer to it only by implication in other articles, or why they would repeatedly mention treaties but not the law of nations.

I do not contend that this is the last word on the subject of authorization. Complicated arguments about authorization have been and will continue to be developed. Professor Goldsmith and I address some of these arguments in our article, including the argument that the authorization comes from the structure of the Constitution. Significant progress will have been made, in my view, simply if more proponents of the modern position begin to identify and explain the purported authorization.

The authorization issue is particularly important today, given recent changes in the nature of customary international law. As Profes-

87. See supra notes 42-43 and accompanying text.
88. See U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; . . .")
89. HENKIN, supra note 36, at 508 n.16; see also Bradley & Goldsmith, supra note 10, at 850.
90. Jay, supra note 34, at 833.
91. There were statements in connection with neutrality prosecutions in the 1790s asserting that the law of nations was part of "the laws of the United States." See, e.g., Henfield's Case, 11 F. Cas. 1099, 1100-01 (C.C.D. Pa. 1793) (No. 6360) (Grand Jury charge of Jay, C. J.). The meaning of these statements is unclear at best. There is nothing to suggest that these statements meant that the law of nations was part of the "Laws of the United States" within the meaning of Articles III and VI of the Constitution. Indeed, the historical evidence suggests that these statements might have meant simply that the law of nations was general common law, see Jay, supra note 27, at 825-33, or that it was state law, see Robert C. Palmer, The Federal Common Law of Crime, 4 L. & Hist. Rev. 267 (1986). In any event, the Supreme Court subsequently resolved the matter against the law of nations having federal-law status. First, the Court repudiated federal court common law prosecutions such as those conducted in the neutrality cases. See United States v. Coolidge, 14 U.S. (1 Wheat.) 415 (1816); United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812). Second, as the nineteenth century progressed, the Court repeatedly referred to and treated the law of nations as general common law.
92. See Bradley & Goldsmith, supra note 10, at 860-70.
sor Brilmayer has observed, "notions of what international law is all about are central to arguments about whether it belongs in American courts." In this regard, much of the traditional customary international law of the nineteenth and early twentieth centuries has either been codified in this country in the form of statutory or treaty law (as is the case, for example, with respect to foreign sovereign and diplomatic immunity) or has become irrelevant (as is the case, for example, with respect to prize law). Consequently, most of the relevance of the modern position claim that customary international law has the status of federal common law concerns what Professor Goldsmith and I have termed the "new customary international law." This new customary international law has evolved largely since World War II, and largely in the area of human rights.

As Professor Goldsmith and I, as well as others, have explained, the new customary international law differs from traditional customary international law in several fundamental ways: it can arise much more quickly; it is based less on actual state practice and more on international pronouncements, such as UN General Assembly resolutions and multilateral treaties; and, perhaps most importantly, it purports to regulate not the relations of states among themselves, but rather a state's treatment of its own citizens. In sum, the new customary international law is less consensual and less objective than traditional customary international law, and it is more likely to conflict with domestic law.

Although these changes in the nature of customary international law certainly could be questioned (both normatively and descriptively), I do not take issue with them for purposes of this paper. My

94. Foreign sovereign immunity is now the subject of a comprehensive federal statute, the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-11 (1994), and diplomatic immunity is the subject of treaties to which the United States is a party. See, e.g., Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.
96. See Bradley & Goldsmith, supra note 10, at 838-42.
argument is simply that these developments further compel consideration of the proper domestic institutions for giving effect to this law. In particular, they arguably increase the need for the law to go through U.S. democratic processes before having the effect in this country of federal law.99

This need is further heightened by actions taken by the political branches in recent years with respect to international human rights law. For better or worse, the political branches have gone out of their way not to convert international human rights law into domestic law. Much of the customary international law of human rights is reflected in multilateral treaties.100 The first thing that is noteworthy about these treaties is that the United States has so far declined to ratify many of them.101 In addition, for the treaties that it has ratified, the United States has consistently attached a series of reservations, understandings, and declarations ("RUDs") that purport to limit the treaties' domestic effect.

As an example, the United States attached to its ratification of the International Covenant on Civil and Political Rights102 "the cornerstone of modern international human rights law"103 five reservations, five understandings, and four declarations.104 These provisions include retention of certain substantive rights that are in conflict with provi-

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(1995/96) (defending modern customary international law as consistent with traditional principles).

99. As Professor John Rogers has pointed out: "To say that the courts have an additional body of 'higher law' to apply, to be found in the whole amorphous body of customary international law, is to inject an enormously distorting overdose of additional power into the judicial branch. This is particularly so in the area of human rights, where practice is difficult to ascertain, and evidence that nations feel bound by international human rights norms is difficult to distinguish from hypocrisy." Rogers, supra note 59, at 117.


sions of the Covenant, such as the right to execute juveniles. They also include a federalism clause, stating that, in implementing the treaty, matters within the jurisdiction of the constituent states may be implemented by the states rather than by the federal government. In addition, they include a declaration that the treaty is not self-executing. Similar provisions appear in connection with the U.S. ratification of other human rights treaties.\textsuperscript{105}

One motivation for these RUDs, which the government included in the face of substantial domestic and foreign opposition, "was a desire not to effectuate changes in domestic law."\textsuperscript{106} Thus, again taking the example of the International Covenant on Civil and Political Rights, the non-self-executing declaration "clarifies that the Covenant will not create a private cause of action in U.S. courts";\textsuperscript{107} the federalism understanding "serves to emphasize domestically that there is no intent to alter the constitutional balance of authority between State and Federal governments or to use the provisions of the Covenant to 'federalize' matters now within the competence of the States";\textsuperscript{108} and specific reservations that preserve differences between United States law and the requirements of the Covenant ensure that "changes in U.S. law in these areas will occur through the normal legislative process."\textsuperscript{109} This position of the political branches of our government further brings into question the independent incorporation of such norms into domestic law by the federal judiciary.\textsuperscript{110}


\textsuperscript{106} David P. Stewart, United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations, 42 DePaul L. Rev. 1183, 1206 (1993).


\textsuperscript{108} Id. at 18.

\textsuperscript{109} Id. at 4.

\textsuperscript{110} Some commentators suggest that the exercise of this independent judicial power should not be a matter of concern because Congress can always overrule the courts if it disagrees with their decisions in this area. See, e.g., Henkin, supra note 58, at 1566. There are a number of problems with this reasoning. First, not all proponents of the modern position agree that Congress can in fact overrule customary international law. See Henkin, supra note 17; Henkin, supra note 58. Second, the argument proves too much. The argument could be made, for example, regarding all of the Swiftian general common law, yet Erie declared that the federal courts do not have the power to make such law. See 304 U.S. at 78. Third, the argument assumes that Congress has the information, time, and political ability to overrule what it would view as judicial mistakes in this area. In fact, these institutional limitations may mean that "lawmaking by federal courts would in most cases give the last word to the federal courts rather than to Congress."
IV. Conclusion

For the reasons discussed above, and for other reasons articulated in my article with Professor Goldsmith, customary international law should not have the status today of federal common law. Acceptance of this conclusion does not mean that customary international law would necessarily have the status of state law. Absent some sort of legislative enactment, it may not be law at all for U.S. courts, in either the state or the federal courts. If states did choose to borrow international law principles into their law, they presumably could do so, and this borrowed international law would have the same effect as other state law. At first glance, this conclusion—that states might have a role in interpreting customary international law—may seem surprising. But it should not be. This was true historically, as discussed above. Moreover, in the area of human rights law, incorporation of international norms by the states generally would make the states more rights-protecting than the federal government, a status that is often allowed to the states in other areas of law.111

Despite my disagreement with the modern position, I want to emphasize that I am not, to use Professor Paust’s term, an “enemy of customary international law.”112 My concern here is not with the legitimacy of customary international law but rather with the proper institutions in our constitutional structure for incorporating such law into U.S. law.113 As a result, my analysis is not intended as an argu-

Thomas W. Merrill, The Common Law Powers of Federal Courts, 52 U. CHI. L. REV. 1, 23 (1985). Fourth, the argument begs the question of why the normal constitutional presumption that state law governs in the face of political branch silence should not apply. Cf. Barclays Bank PLC v. Franchise Tax Board of California, 512 U.S. 298, 331 (1994) (rejecting challenge under dormant foreign commerce clause to state taxation rule and noting that “we leave it to Congress—whose voice, in this area, is the Nation’s—to evaluate whether the national interest is best served by tax uniformity, or state autonomy”). Finally, and perhaps most importantly, if the exercise of this judicial power is improper, then it should not be allowed to occur in the first place. See Merrill, supra at 22.

111. See 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 1.6, at 70 (2d ed. 1992) (“state courts are always free to grant individuals more rights than those guaranteed in the Constitution, provided it [sic] does so on the basis of state law”); id. at 71 (“one must always remember that the state courts may exceed the federal courts in the granting of rights under the state’s laws or constitution as long as they do not violate a restriction of federal law”)

112. Paust, supra note 20.

113. For a powerful criticism of the tendency of some courts and commentators to focus on rights to the exclusion of structural and institutional considerations, see ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 62-72 (1989). This tendency may explain Professor Lessig’s recent suggestion that the decision whether to require U.S. courts to obtain authorization from the Constitution or the political branches before applying international law as federal law involves a choice “between a particular philosophy of law and a value of justice.” Lessig, supra note 79, at 1810. The sharp dichotomy drawn by Professor Lessig ignores the possibility that institutional considerations may themselves have implications for justice. His statement may also reflect an assumption.
ment, for example, against ratification of human rights treaties or the enactment of expansive human rights legislation. Indeed, it could be read as inviting exactly such measures. In my view, incorporating international law in this fashion, rather than on an ad hoc and inconsistent basis through the judiciary, will actually be better in the long run for the domestic enforceability of international norms.

that courts are the principal agents for justice, a proposition that is both uncertain and controversial. See, e.g., GERALD N. ROSENBERG, THE HOLLOW HOPE (1991) (questioning the ability of courts to bring about social change).